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6

Case and Comment

The Lawyers' Magazine—Established 1894

IN THIS ISSUE

Volume 54 No. 1

FROM A to Z

ABANDONMENT to ZONING

the law is stated for you in

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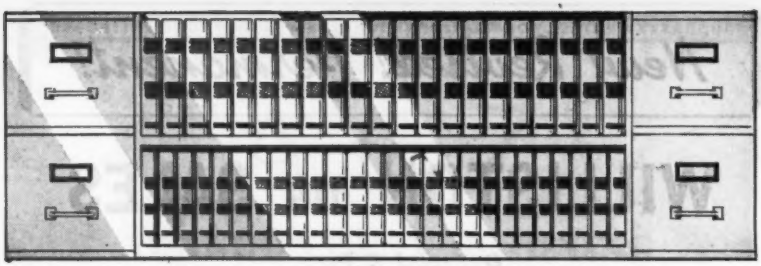

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Legal Entanglements for the Rain-maker

By ELI GOLDSTON

Condensed from The Harvard Law School Record, March-April, 1948

MARK TWAIN'S observation, "Every one complains about the weather but no one does anything about it," became obsolete on July 12, 1946. That day Vincent J. Schaefer, a General Electric Co. chemist, produced snow by passing a dry ice pellet through an artificial cloud in a home-type deep freeze unit. Outdoor experiments followed, and then on Dec. 20, 1946, a Schaefer outdoor experiment coincided with an 8-inch snowfall in upper N. Y. and Vermont. The Weather Bureau forecast had been "fair and warmer." Schaefer modestly declined credit for the storm, but G.E.'s legal staff hurriedly called a halt to outdoor experimentation. Although direct legal precedent was lacking, there could be a deluge of *trespass q.c.f.* suits with possibility that some of them might establish genuine consequential damages of property injury and personal inconvenience.

G.E. stumbled into the artificial precipitation field while engaged in wartime research on military smoke screens. Their present attitude is that the whole matter properly belongs to the government, and that the government by suitable legislation should both regulate the inducing of rainfall and indemnify for loss any contractor acting on the government's behalf. Meanwhile G.E. has been trying to get a "save harmless" clause in its contract with the government. Contracting officials have refused because the clause would commit the government to indeterminate amounts, possibly exceeding authorized appropriations. In order to keep the Army-Navy-G.E. experiment (known as "Project Cirrus") operating, G.E., with a worried glance at the law of agency, has accepted the contract without the clause but forbids any employee to handle the apparatus in outdoor experiments.

Amateur rainmakers, however, have already stirred up considerable controversy with no reported cases as yet. Dean Pound has suggested that "the chief factor in determining the course which legal development will take with respect to any

new situation or new problem is the analogy or analogies that chance to be at hand when those whose function it is to lay down the law are called upon to make an authoritative determination." So, even without cases precisely in point or applicable legislation, it is possible to adumbrate the common law which is likely to develop.

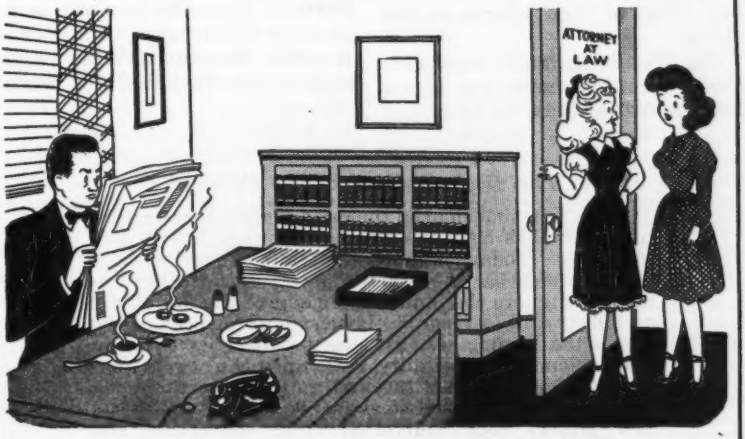
First of all, it is quite clear that existing tort law makes actionable intended trespass to property or negligent harm to it, even though the defendant merely sets in action a sequence of events resulting in the legal injury. Thus the Arizona Date Institute, representing growers who require a dry season from August to December for a good crop of fruit, could have backed up its public warning to would-be rainmakers that they would be subject to heavy damages if either wilfully or carelessly they harmed the date crop. A large midwestern newspaper induced rain for a publicity stunt and "almost landed it on the demonstration farm." They are reputed to have settled out of court in full the claim of a neighboring farmer whose seeds were drying where the rainfall did land. Of course, denying factual cause in this instance was embarrassing because of the defendant's own public boasting.

In our atomic age, however, convincing a jury of legal causation should not be difficult. Perhaps in the jury box may even be the man who declared in the N. Y. Herald Tribune letters to the editor column of January 14, 1948, that the "big snow" which crippled N. Y. City was caused by "a certain multi-millionaire with more time and money on his hands than is good for people and who wanted to insure a white Christmas for his pleasure-loving friends." Of course, like the restaurants which are blamed for every stomach upset, the rainmakers may reap where they did not sow. The 22,000 acre farm in N.J. which supplies most Birdseye frozen vegetables induced 2/100 of an inch of rain about 5:30 one evening and was castigated locally for rain which occurred at noon, more than 5 hours earlier, and which caused the housewives to take their clothes in. The Weather Bureau has received letters which claimed that showers were produced artificially at times before the seeding process had been started.

The argument that in a dry area the balance of interests requires that rainmaking harm (like the danger from grade crossings) be *damnum absque injuria* is inapplicable when the rainmaking is incidental to a newspaper publicity scheme rather than a continued effort to relieve drought. Indeed, courts may well hold that weather tinkering is an extrahazardous activity and impose strict liability.

In many ways the rainmaking situation is similar to blasting operations where defendants have been held liable without fault in direct trespass for casting debris on plaintiff's lands. Especially when airplanes are used is absolute liability likely since the *Restatement of Torts* still considers aviation extra-hazardous. In Kansas an injunction was filed but later withdrawn to restrain some commercial rainmakers who planned to deluge a county fair as an advertising stunt to the farmers. In this instance the plaintiff relied on the tort catch all of "nuisance."

A particularly interesting tort problem arises in the proposed "triggering" of snow storms outside metropolitan limits in order to save expensive snow removal. Irving Langmuir, Nobel laureate, at the 1948 Institute of Aeronautical Sciences reported that within 3 years enough basic knowledge will have been accumulated to divert most heavy snowfall from our cities and that it should be an established practice in 10 years. An 1884 English case (13 Q.B.D. 131) has already posed the basic problems involved. Rainwater from an unusually heavy storm piled up behind defendant's embankment. He cut ditches through the embankment (the



"His wife won't let him read his paper at the breakfast table!"

jury found no negligence in this) to relieve the water pressure, and the escaping water injured plaintiff's property. Although defendant was found liable, the court suggested that it would have been perfectly all right to divert the flood to the plaintiff's land by diking defendant's boundaries in self-defense against the flood, citing the famous case of the squib in the market (95 E.R. 1124). Would the court follow its dictum in a case involving diversion of a hurricane? Last November irate Savannah officials claimed that dry icing by "Project Cirrus" had shunted a hurricane to Georgia from 500 miles at sea. "Project Cirrus" dug up records of a 1906 hurricane which had behaved similarly and denied any effect of their efforts on the storm.

In the long run, however, these tort problems are much less important than the property issues. G.E., which has developed a second means of precipitating rain by silver iodide crystals blown aloft from the ground, has suggested that it could tremendously increase rainfall in certain areas near mountains. The difficulty lies in the fact that changes advantageous to one area may be disastrous to others.

All this is a far cry from the Hopi Indian dances, Montgolfier's experiments with cracked ice thrown from his paper balloon, and the charlatans who victimized farmers during 19th century droughts. For the first time in man's history he is not on the defensive protecting himself from the climate but on the offensive changing the weather. Fortune Magazine has well summarized future prospects in true Weather Bureau style as "high legal winds followed by better climate."

The Highest Duty of the Courts

From time immemorial the most conspicuous feature of history has been the struggle between liberty and authority. Today, as in ages past, we are not without tragic proof that the exacted power of some governments to ignore the inalienable right of the individual to liberty and to resort to lawless enforcement of the law is the handmaid of tyranny. No higher duty, no more solemn responsibility, rests upon the courts than to maintain the constitutional and statutory shields planned and inscribed to preserve liberty under law and protect each individual from oppression and wrong, from whatever source it may emanate.

—*White, J., in Ware v. Dunn,* 80 A.C.A. 1065.

Entertainment Deduction for Lawyers

By RALPH R. BENSON

Condensed from
Los Angeles Bar Bulletin, September, 1948

CASE after case on the allowability of entertainment expenses as an income tax deduction hammers away at the basic point that expenses for entertainment must be for the entertainment of the client and not of the lawyer.

Stated more formally, expenses for entertainment to be allowable can only be ordinary and necessary to the carrying on of a legal practice if the sole object of such expenditures is to obtain or retain clients. Purely living expenses are, of course, non-deductible.

Exemplifying the degree of proof required to show the link between the expense and obtaining business is the interesting case of a lawyer who succeeded in deducting golf club dues in full. In the words of the District Court judge:

"The plaintiff stated he did not enjoy playing golf; that green fees and food, paid for his prospective clients, were the largest item on his monthly club bill. Plaintiff testified that he did not enjoy golf because he felt he should be working at the office. At the time of the formation of the partnership it was agreed that the club dues and expenses were to be charged as business expenses and were so charged on the books. The facts disclose that the main purpose of the plaintiff in joining the clubs was to obtain business and the plaintiff gave many names of clients secured by his partner and himself in this manner . . . and the Government cannot refuse to allow plaintiff a deduction as a business expense of the money which produced the business. To rule otherwise would revive the fable of the goose and the gold eggs." Johnson (DC, Calif), 45 F Supp 377, 42–1 USTC ¶9180; reversed on other grounds (CCA 9), 135 F2d 125, 43–1 USTC ¶9404 (1943).

If entertainment expenditures can be compared to this mythical goose, then it is possible upon the evidence of the particular case to have a 75% goose, or a 25% goose as well. In another case involving golf club dues, a judge of the Tax Court allowed two-thirds of such dues as a business expense, and said:

". . . we are not convinced that petitioner's use of the clubs was solely motivated by cold-blooded business considerations. Although the evidence of purely personal or social use is scant, we are unable to conclude that his use of the three clubs named was without its social aspect. In this situation some allocation to business use and social use must be made." Lee, 5 TCM 240, 241 (1946).

Indeed, the disposition of each claimed business expenditure "turns on the facts of each case." Not to be overlooked is a situation in which the purpose of joining a club is for the retention of a clientele and not particularly for the purpose of enlarging it. Such expenses are deductible for there is the necessary business element present.

However clear the facts may be to the taxpayer-attorney, it is his job to bring out those particular facts identifying the nature of his claimed expenditure. His is the burden of proof. He does not meet it if he merely presents the argument ". . . that in general, membership in social, political, and fraternal organizations is helpful in obtaining clients through contacts made thereby" and couples with it merely "the citing of one instance of gaining a client through acquaintance made at a political club." Boehm, 35 BTA 1106, 1109 (1937). Proof requires specific facts; some sort of a showing.

Neither the Tax Court, the District Court nor the Commissioner of Internal Revenue desires to usurp the function of the American Bar Association in declaring a canon of ethics. When entertainment expenses tread into the realm of unethical conduct as prescribed under the existing canons, then such expenditures should be disallowed on the simple ground of public policy. Such situations, it is hoped, are rare.

A technical but important point in reporting entertainment expenses is to prevent

"Then one day I was asked to appear as a witness in court—and here I am."

overlapping of items. It is well to set out separately the various items, such as club dues, theatre tickets, telephone charges, automobile expenses, yacht upkeep, dinners out and at home, depreciation on radio and cocktail table, attending bar conventions.

Another technical point which seems to present some difficulty is whether entertainment deductions can be claimed only by the partnership on Form 1065, or whether a partner can claim entertainment expenses for which he is unreimbursed by the partnership on his own Form 1040.

On its face, there is a simple problem of the parties deciding on their arithmetic as to whether the particular entertainment deduction is to be taken on one return or to be split two or more ways. Behind such fundamental mathematics is the dilemma of whether one taxpayer (the individual) can take a deduction for an expenditure made on behalf of another taxpayer (the partnership).

Happily, such a dilemma which plagues corporation-and-corporate - executive - situations seems to have been averted by an Office Decision which says that if the taxpayer was required by the partnership agreement to furnish his own expenses without reimbursement he can deduct such expenses on his own return, OD 1122, 121, taking the deduction into consideration before computing his adjusted gross income. Thus, as to partnerships, the question as to the person entitled to the deduction seems answered easily enough. At any rate, a recent Tax Court case assumes the point without discussion, and the case was acquiesced in by the Commissioner, Jacobson, 6 TC 1048 (Acq) (1946).

Beyond a doubt, a complete itemization of amounts spent, where spent, and for what client, would be most desirable in ascertaining the amount of the entertainment expenditure. However, business records on such matters are commonly not kept and lawyers are no exception to the general rule. An estimate is acceptable. As said by Circuit Judge Learned Hand in the leading George M. Cohan case:

> "Absolute certainty in such matters is usually impossible and is not necessary; the Board should make as close an approximation as it can, bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making. But to allow nothing at all appears to us inconsistent with saying something was spent. True, we do not know how many trips Cohan made, nor how large his entertainments were; yet there was obviously some basis for computation, if necessary by drawing upon the Board's personal estimates of the minimum of such expenses. The amount may be trivial and unsatisfactory, but it was wrong to refuse any, even though it were the traveling expenses of a single trip. It is not fatal that the result will inevitably be speculative; many important decisions must be such." Cohan (CCA 2), 39 F2d 540, 2 USTC ¶489 (1930).

This Cohan rule has often been applied, with varying re-

sults for the taxpayer. Some estimates have been allowed to the extent of all, some 50%, some none. Estimating an expense can sometimes be a double process. First, an estimate is made of the total expenditure. Second, an estimate is made of the portion of the total allocable to business rather than the personal account.

For lawyers who are themselves employees of other lawyers, an entertainment deduction is also available as to unreimbursed expenses. However, the employed lawyer takes such deduction as a miscellaneous deduction *after* computing his adjusted gross income. Therefore, his expenditures actually avail him nothing on his tax return if he elects to use the alternative tax table or the standard deduction. The employee claims such a deduction for unreimbursed entertainment expenses by applying the tests of ordinary and necessary expense; and he may also estimate. Although the law is not entirely settled, the argument that one taxpayer (employee) should not be allowed to take a deduction for another (his employer) seems without merit if his employment expressly or impliedly requires the outlay of such unreimbursed sums.

The lawyer, just as any other professional man who takes a deduction for entertainment expenses, may suffer some qualms knowing that such deductions admit the "strictly business" nature of ordinarily social contacts. However, just as any other taxpayer, the lawyer should be loath to overlook an allowable tax deduction.

Latin and the Law

Apart from maxims and from terminology in the narrower sense, law reports and text-books contain a multitude of auxiliary Latin words and phrases. Take for instance the (apocryphal) proposition that *primâ facie* a *donatio mortis causâ* vests *a morte testatoris* in the donee, *cum onere* if any, *per formam doni*, under the *lex loci rei sitæ*. Latin invades even a narrative of facts:—*Vide In re Brown* where an annuity *durante viduitate* was bequeathed to a widow *dum sola et casta vixerit*. She, not being *bona vacantia uberrimae fidei* went *in expeditione in pais* with a *novus actus interveniens* but, *ipse dixit*, merely *nuces colligere*. The trustee, *quia timet* that she had *mens rea*, followed her, causing *in terrorem* a stoppage *in transitu*. Held that until *plene administravit* the widow had a *locus pœnitentiæ* and *mutatis mutandis* was entitled to *restitutio in integrum*. *Secus, per* the *obiter dicta* of Smith, J. (*dubitante*), if the parties were found *in puris naturalibus* and *in flagrante delicto*.—Law Notes (England)

Preparation for Trial of a Lawsuit

by RALPH OMAN *of the Topeka, Kansas, Bar*

Condensed from The Journal of the Bar Association of the State of Kansas, August, 1948

THERE are as many ways of preparing a lawsuit for trial as there are of trying a lawsuit, or of settling one, or of making an argument or of doing any one of the dozens of things that a lawyer must do in his daily practice. People are not constituted the same, their temperaments are different, their ideas are different, and each lawyer who has a lawsuit to try either does it in a manner which he thinks will produce the best results, or else he tries to ape some older member of the Bar or some historical or fictional character. I think that many of us have started out to be a Clarence Darrow, a Daniel Webster or a Perry Mason, and after a good many false starts have realized that we do better when we are ourselves.

I have seen lawyers, and you have too, who cannot sleep upon the eve of a trial, who will sit up half the night before, reading and re-reading the pleadings, the evidence, the law, and the statements of witnesses and appear the following morning in the worst condition they have been in for some time. There are those who are able to relax, realizing that they have the case in hand, and they retire the night before to sleep like a baby until the judge calls the case for trial. There is still another school of lawyers who believe in celebrating the night before trial rather than taking the chance on not feeling like letting off steam after the verdict is in. This system is a good one if you can stand it.

If you are defending, the first thing you will want to know is what the petition states. When you pick the petition up from the clerk's office, you will probably notice that there is considerable variation in the story that your client has told you when compared with the allegations in the plaintiff's petition. An old practitioner in Topeka, long since deceased, said that he followed the practice of doing three things in the following order: First, he got a retainer; Second, he filed a motion to quash the summons; and Third, after the motion had been over-

ruled, he asked his client for a refresher. Having disposed of those preliminaries, he was then ready to go to work.

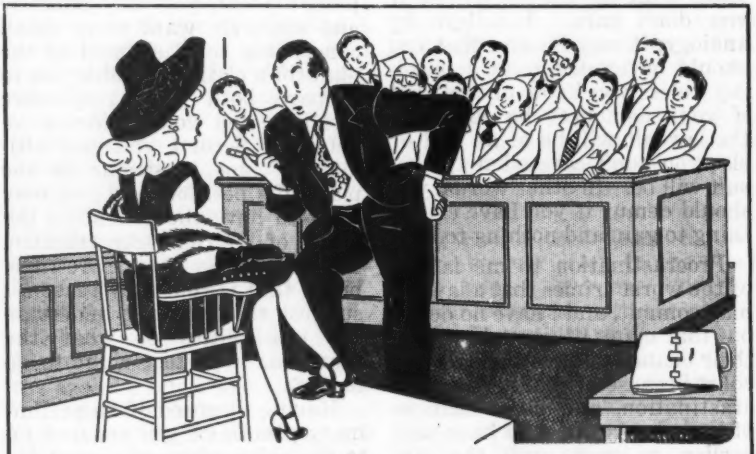
After the plaintiff's petition has been examined and the story set out therein has been reconciled with your client's version, you are then interested in two factors: The law and the facts. It would be a convenient thing were it possible to always be able to produce a set of facts which would fall within the law most favorable to those facts and to your client. Unfortunately, the lawyers do not make the facts. It has been said by a well-known trial lawyer that you should never ask a question upon cross-examination unless you either know what the answer will be or you don't care. I believe by analogy, it may be said that you should never demur to a pleading unless you know or feel that if your demurrer be sustained the lawsuit will be at an end or else you don't care what the result will be. In other words, you should demur if you have everything to gain and nothing to lose.

Procrastination to me is one of the worst crimes that a lawyer may commit, and I have no doubt but that many litigants have lost their chance to have their day in court because of the inertia, procrastination, and plain laziness of their lawyers. As I have said earlier, to wait until the last minute to write a paper or prepare a lawsuit or file a lawsuit is not the thing to do.

The question presented in your opponent's petition may be so obscured and ambiguously stated that you may feel that the allegations should be more definitely set out in which case you will want to file a motion to make more definite. Motions to make more definite and certain are generally filed for three purposes: First, you may honestly and sincerely want more detail concerning some element of the plaintiff's claim to enable you to prepare both your responsive pleading and your evidence on defense. Second, you may ultimately want to demur to the plaintiff's petition, and you may want to have the benefit of the rule of strict construction. Third, you may want more time, but if that is your only reason, I suggest that you not underrate the possibilities of what the court has a perfect right to do to you.

Having disposed of all preliminary pleadings, you are now up to the point where you must file an answer. Once again, it is highly important that you be thoroughly familiar with all of

the code provisions respecting pleading and the many decisions construing such statutes. You will want to be sure that all affirmative defenses upon which you rely are properly pleaded, and if there are any matters to be denied under oath, you will most certainly want to see that your answer is properly verified, both as to the allegations set out in the answer and the denials therein contained. If there are matters set out in the plaintiff's petition which need not be denied, then they should be admitted. You may want to obscure your defense as much as possible by filing a general denial, and if you elect to plead along that line, you must be certain that the defenses which you desire to conceal until the time of offering evidence are such defenses as may be proven under a general denial. It may be that the plaintiff has either omitted some essential allegation in his petition upon which you might have educated him had you demurred to it, or the manner in which certain matters have been pleaded may indicate to you that the plaintiff is unaware of the importance of proof upon that particular point. In this situation, you have probably elected to answer rather than demur upon the theory that the plaintiff's failure to prove this vital point will either leave him wide open to a demurrer to the evidence, or



"Would you mind moving to one side so the jury can see my legs?"

you may even withhold your demurrer to the evidence, lest the court permit him to re-open his case and supply the missing proof, so that you can move for a directed verdict or demur generally to all of the evidence after both sides have rested.

In this connection, the preparation of a lawsuit for trial broadens out so far that questions of pleading and practice become as important as questions of law and fact. I believe that no lawyer should go into the trial of a case, unless it is a comparatively simple one, and my experience has been that there are no really simple lawsuits to try, without having prepared in advance a trial brief. This trial brief, which is ordinarily prepared by the lawyer who intends to try the case, but which in many instances is prepared by some younger associate in the office, should be in such complete form that a stranger to the lawsuit could go in and try the case if necessary without previously having made any preparation for the trial.

First the trial brief should contain an abstract of the pleadings with particular emphasis placed upon essential elements of proof necessary for either party to sustain his position. Any applicable decisions showing the results in the event of the plaintiff's failure to prove certain important and jurisdictional facts should be contained therein so that upon a demurrer to the evidence, the lawyer for the defendant can immediately support his argument upon the demurrer with citations of authority readily available to him. Every possible point of law which may arise either in opposition to the plaintiff's theory of the case or in support of the defendant's theory of defense should be set out in the brief, accompanied by the appropriate citation of authority.

The trial brief should also contain copies of all statements obtained from witnesses which you intend to use and also the statements of any persons whom you think may be called by the other side. If you are fortunate enough to have in your possession a signed statement made by any of the opposition's witnesses, you may want to have in your brief the authority by which you may impeach such testimony or otherwise use such statements upon the cross-examination of such witnesses.

There will be countless questions upon the admissibility of evidence, depending largely upon the type of lawsuit which you are trying. You have doubtless anticipated what the testimony of the plaintiff and his witnesses will be along certain lines, and you may have well-formulated ideas in advance as to whether or not such testimony is competent, and you may have concluded to make certain objections to such testimony. Your brief should contain authorities to

support your contention that such evidence is inadmissible or such witnesses are incompetent to testify. The ability to readily support your objections upon the admissibility of evidence by the citation of good authority is not only helpful and essential to the smooth and orderly trial of your lawsuit, but is appreciated by the court. The question presented may be a new one to the court, it may be upon a point to which the court has not given the thought and consideration which you have. Courts appreciate, and many times need your assistance, in order that the correct ruling may be obtained. As every practitioner knows, the judge hearing your case cannot excuse the jury to look up a question concerning the admissibility of evidence during the trial of a case every time an objection is made, and at the same time, the court must necessarily make a ruling, and he wants to make a correct ruling, and the best way to keep the court in line is to be able to give him some good authority upon which his ruling may be based. By the same token, you will want to be able to support the competency of your own testimony, and if opposing counsel interposes an objection to some vital testimony offered by your principal witness, the burden rests upon you to be able to show to the court either by a textbook statement or the citation of good authority that such testimony is proper and competent and should be admitted.

Your trial brief should also contain copies of requested instructions that you have prepared and also copies of any special questions which you may want to submit.

The form of the question which you ask should, if possible, be taken from some decision wherein a like question has been approved by the court, and if you have such a question, you should cite the case in support of the question which you ask. If at the same time, you anticipate that your opponent will ask questions, and you have any means of knowing the kind of a question he will probably ask, you should, if possible, have covered this point in your trial brief so that your objections to the form of your opponent's questions may be supported by some authority which has disapproved the question in the form submitted by your opponent.

Your trial brief should also contain appropriate citations with respect to the various decisions of our court with respect to invited error, the law of the case, the right to inspect and examine the court's instructions before they are given, and the result to you and your lawsuit if you fail to make timely objections thereto, as well as the necessity and obligation upon your part to submit your own requests for instructions.

Everything else being equal,

the lawyer who has prepared his case well has the better chance to prevail. He not only serves his client best, but he creates a good impression on the jury, and the court will be ever grateful for the help that he has received. I think that lawyers, particularly in jury cases, are inclined to overlook the fact that if they will only help the court, the court will help them. By that I do not mean that the judge will show you or your client any favors, but that your client's problems in the lawsuit at hand will receive a better and more thorough consideration if you are able to aid the court as the trial progresses. The court is entitled to your assistance, and I firmly believe that if you come into court well-prepared and your opponent does not, that consciously or otherwise, your side of the case will receive better consideration than the other fellow's.

Judges have been known to publicly say that what otherwise might be a chore to them becomes a real pleasure when the case is tried by good lawyers. I interpret that feeling to be that any lawyer who comes into court well-prepared on the law, the facts and the practice questions likely to arise in his case, is a good lawyer in the eyes of the judge before whom he appears.

In closing, I would like to suggest that the days of the old-time practitioner who depended upon a nimbleness of wit, a profound knowledge of human nature, and a Fourth of July type of oratory are numbered. Their passing is not without some regret. Those tobacco-spitting, gallus-snapping characters who bragged that they practiced law solely by ear are fast giving way to a more mobile and mechanized force of younger men who depend more and more upon studious and careful preparation of each and every case they have to try. Perhaps the law schools and the lawbook salesmen may be responsible. It may be due to a loss of national individualism, if there be such a term, but whatever it is, I'm afraid it's here to stay. I think the advantage in the future lies with them.

An Unfulfilled Promise

The following is a letter sent us by contributor, Guido J. Napoletano, Kingston, New York:

"Thanking you for your kindly co-operation, also, for your patience. I believe the Item is $27.00, which figure I will gladly remit to you tomorrow, provided our stable cuts loose 'Mary Schultz' in the 5th Race at Aqueduct today. At Post 4:15 this afternoon. If scratched or fails to win, be assured that this item, in any event, will soon be paid in full to you."

"Mary Schultz" won the 5th at Aqueduct, but the $27.00 was never received.

$ $ $ The $ $ $ Million-Dollar Estate

BY EVO DECONCINI
Justice of the Supreme Court of Arizona

HENRY was an educated man—yes, Henry was a college man—he was a lawyer. In spite of all his knowledge he knew very little about life. Oh, it wasn't that he didn't understand philosophy because he had read many of the old masters. He was proud of that. He loved to quote Plato and Socrates; these were his favorites.

As Plato said "Premises wrong conclusion must be," or Socrates' answer when a young man asked him if he should get married. Socrates replied "By all means, by all means, you will either be very happy or become a philosopher."

Yes, Henry knew quite a bit. He more than browsed through the Harvard Classics. He was a whiz in English literature. He covered Shakespeare, Milton, Chaucer, Browning, Burns, and lesser lights in two semesters. There was no use talking, Henry was educated.

But what interested Henry more was his practice of law. He worked hard. His ambition was to succeed, he did succeed. His practice included everything at the start, some cases good pay and some poor.

He even made a foray into politics. Henry was no exception. Every lawyer sometime has the urge to enter the political arena. It's no use advising them against it, they either have to try it or resign themselves to their destined fate of never being elected to office "because after all, a good man can't get elected," or "what's the use, someone is always putting pressure on you." But Henry was different. He ran for the office of District Attorney and was elected the first time. Before his two-year term was up he realized it was no place to make money. He resigned his office and felt his experience was worth his time lost. Now work he must, and work he did. Henry's practice grew. His clients prospered and so did he. He worked every day and sometimes Sundays. He provided well for his family. He was a well-thought-of citizen; but he wasn't happy. He had only the urge to succeed, to make money, money, MONEY.

He gradually was becoming a stranger to his family. His temper was moody. His neighbors referred to him as a great thinker. His children were growing up and slipping away from him. He vowed he would spend more time with them, take the boys fishing, go horseback riding with them, but the time never came.

As he grew older—he was only forty-five—he felt he should slow down; but he couldn't stop. He kept up his business and social contacts. He felt one day he would reach his goal: more business, more clients, and perhaps he would some day realize it. His secret ambition was to probate a million-dollar estate.

Probate practice is good, if you can get it and Henry's firm got it. His senior partner had the groundwork pretty well laid, with wills, trust funds, etc. Many estates they probated were above the hundred-thousand-dollar mark and some were in excess of one-half million. But Henry wasn't to be satisfied with less than a million-dollar estate.

The only firm of lawyers that Henry felt was competition to his firm was Krumpart, Mosekin & Jones. They probated several million-dollar estates. But his firm never reached that figure. He calculated on the wealthiest people of the town dying, but they were not always his clients. Once in a while he secretly wished several of his clients

"'Never to hear my wife's sweet voice again'? . . . Gee, Judge, tanks!"

would die because he thought their estates would appraise over a million dollars. Then he would feel so ashamed he would burrow himself so deep in his work that no one would see him for a week.

Then came the war. Business slacked off at first. But not for long. The two younger men in the firm soon joined the armed services. That made more work for him and John, his senior partner. John was now nearly seventy. He, too, had worked hard, lived well and prospered, but he had no ambition to make money, he just made it incidentally. As the work became heavier, and the strain of the war grew on, Henry aged considerably. John warned him of ill-health and at the same time announced his retirement. Not so with Henry, he wouldn't retire until he had that million-dollar estate. He felt that would climax his career.

With John gone the work was even heavier. He wished the war would end so his juniors could return. He worked harder than ever. The strain was terrific. When would that million-dollar estate come in so he could retire? Finally the war ended. Soon his junior partners would be back from the armed services. Then he would take it easy and wait for that million-dollar estate.

One day it happened. Right after breakfast he felt a pain in the region of his chest. He didn't go to the office. He went to bed. He was sure it was some form of indigestion and it would soon pass. It didn't pass; it persisted. When the doctor came he was only conscious of a heavy weight upon him. Occasionally he would open his eyes but he wouldn't see anything.

Hours later he awoke in a quiet blue room. The bed was strange and so was his wife. The nurse came and told him to be quiet. He was quiet. He passed out without a struggle, just forty-nine years after first seeing a hospital room.

After the obituaries were read, said and published, Henry's will was filed for probate by Krumpart, Moeskin & Jones. His estate appraised one million dollars.

PROVERB: "It's later than you think."

How True

The eight-year-old daughter of a lawyer asked:
"What is alimony, Mother?"
"Alimony, my dear, is a man's cash surrender value."

Contributor: Frederick L. Wolff
Omaha, Nebraska

Counsel to the Counsellor

By CHRISTYNE CONRAD

FROM time to time we hear the Lawyer expound the requirements for a good Legal Secretary, and how much he would be willing to pay for those qualities, but little do we hear of the "Answer and Counter-Claim." If a Secretary remains with one Lawyer year after year, the reason is irrelevant, immaterial and incongruent and her salary is a secret!

The truth is that Legal Secretaries are hard to keep because they demand such "high" wages—though not *material* wages. Some Legal Secretaries have been known to work year after year, for the same man, for almost NOTHING in the way of actual cash! But the *mental* wages were always high. Although the Legal Secretary has spent much more time, effort and money in learning shorthand, typing, spelling, etc., than the average working girl, and in addition, is equipped with a sensitive, intuitive, understanding an and open-minded toward all humanity, still, she measures nothing by cash! The Lawyer who can give her prestige can pay well. You need not advance her salary, if you have advanced *her* to the place where she can sign her own name to *your* letters. If you refer to her in the presence of clients, as *my legal secretary,* you will have given her a raise in mental salary. If she is called upon to take confidential information in the presence of the client, then you need not worry about her listening to more lucrative offers.

Remember always, that a Legal Secretary has the highest regard for her boss—if she didn't have, she couldn't work for him at any price. That is the inevitable outcome of her training.

He may have a million faults, but never, never, *never,* so long as she works for him would she admit, even to herself, that he has *one.* So long as she can respect his ability as a Lawyer, he can do anything else in the world that he chooses. If he can draw a good pleading and can give her credit for recognizing one, she will match his stride and will give him measure for measure. She will work any hours that are required if the boss is only wise enough to insinuate that he couldn't get along without her.

To a Legal Secretary, nothing is so degrading as to be left out of the case entirely, and not to be advised of the outcome—that is equivalent to a drastic reduction in salary! The Lawyer is indeed wise, who takes his Secretary into the Courtroom with him occasionally, if only to listen. She likes nothing better than to work every hour that he works and as many more as are required to accomplish what he wants.

A Lawyer, to his Secretary, holds the highest throne on earth—far above and beyond that of any other businessman—neither husband nor father are more highly respected. She is deaf, dumb and blind to any shortcomings that he may have—his word, alone, is "law" and she requires no attention, no politeness, no explanations and no material compensation, ONLY to be needed, openly, so that all the world may see.

(Of course, she might be induced to accept a small cash settlement on the 1st of each and every month, in addition thereto.)

An Organic Statute

A correspondent calls attention to a Massachusetts statute dating from 1789 but still on the statute books (see Annotated Laws of Massachusetts, c. 71, § 30) as having "a ring of both sincerity and austerity mighty rare in these times."

The statute is as follows: "The president, professors and tutors of the university at Cambridge and of the several colleges, all preceptors and teachers of academics and all other instructors of youth shall exert their best endeavors to impress on the minds of children and youth committed to their care and instruction the principles of piety and justice and a sacred regard for truth, love of their country, humanity and universal benevolence, sobriety, industry and frugality, chastity, moderation and temperance, and those other virtues which are the ornament of human society and the basis upon which a republican constitution is founded; and they shall endeavor to lead their pupils, as their ages and capacities will admit, into a clear understanding of the tendency of the above mentioned virtues to preserve and perfect a republican constitution and secure the blessings of liberty as well as to promote their future happiness, and also to point out to them the evil tendency of the opposite vices."

• Reprinted from *The Shingle*, October, 1948

The Compleat Attorney

(1948 Edition)

By ROBERT J. CALLAGHAN
of the Philadelphia Bar

EDITOR'S NOTE: Mr. Callaghan, Editor of The Shingle, published by the Philadelphia Bar Association, recently sent out questionnaires to its members. The summary printed below represents 313 answers he received.

HE IS a man of undetermined age, but probably a little on the sunny side of 45. He is married, has two children who more than likely go to private school. He just about lives inside the city. He smokes and drinks, but eschews politics.

He is active in a couple of civic and charitable organizations and in one fraternal or social organization. He is more of a church member than a church goer.

We owns his home; a car. He carries between $25,000 and $30,000 life insurance on which he has borrowed little or nothing.

He has no particular preference on the radio but more than anything else leans to classical or semi-classical music and to the news and news commentators. He is not too keen about the comedy programs.

His favorite magazine is *Time* with *Life* running second and *The Shingle* also ran.

He sees about three shows a year and about a dozen movies.

Varied and not too highly emphasized, his hobbies tend toward golf, reading and gardening.

He takes about two weeks' vacation in the summer and none in the winter. He prefers the seashore to the mountains—or at least his wife does.

He registers and votes Republican both locally and nationally. He is (at least, he was) for Stassen for President (of the United States, that is).

He is a graduate of the University of Pennsylvania Law School, is engaged in the active practice of the law and holds no outside employment either private or governmental.

He considers his practice general rather than specialized. More than anything else it runs

to probate work and then to corporate, real estate and other forms of commercial activity. He spends something less than ten per cent of his time in litigation.

He is usually in his office by 9 o'clock and out by 5, 5:30 at the latest. His coat comes off in the warm weather—and stays off, clients or no clients.

He thinks the law a jealous mistress and spends about one-sixth of his spare time on his practice. He averages maybe a night a week attending organizational, political and other meetings. The great bulk of his spare time, however, he spends with his family, friends and recreation.

He is an optimist in that he believes his ship has started to dock and a bit of a fatalist in his agreement with the Bard about that flood-tide. He credits his success to his friends, more than to any other one external factor. He also believes that one thing led to another, that luck played no small part in his progress, and that getting in the right office didn't hurt him any. A truly unconceited person.

If he had it to do over again, he would practice law. If he were not a lawyer, he probably would prefer to be a doctor.

He thinks there is room for improvement in the Bar Association and particularly thinks that the election of officers should be made more democratic and not so cut and dried; that the basis for membership on Committees should be broadened; that the Bar Association should take a more active stand in determining who should go on—and stay on—the bench and in improving conditions in the courtrooms and in City Hall; and should be much more active in guiding civic affairs.

He has been practicing law between 15 and 20 years, closer to 20 than 15.

His practice nets him around $10,000 a year. This is better than he used to do—and he can live on it.

How do you stack up with this mythical man?

Burden of Proof

"We commend the District Attorney for his conscientious prosecution of this case. We may even concur with him in speculating or surmising that the defendant may be guilty, but we cannot escape the conclusion that the record contains no competent evidence . . . that a public offense was committed . . ." *People* v. *Schuber*, 71 Advance California Appellate Reports 980.

Contributor: W. R. Dunn
San Francisco, California

Among the New Decisions

Amusements — *exclusion from places of.* A citizen and taxpayer who, because of mistaken identity and without any sufficient reason, had been excluded from the Aqueduct Race Track, sought a declaratory judgment establishing his right to enter the race course and patronize the pari-mutuel betting there. The trial court enjoined the operator of the track from excluding the plaintiff. The Appellate Division reversed this order and dismissed the complaint.

The Court of Appeals affirmed the Appellate Division and held that, as the exclusion was not on the ground of race, creed, color, or national origin, within the Civil Rights Law, the operator of the track was within its rights. The court applied the common-law rule that the operator of a private enterprise, as distinguished from those engaged in public callings, such as innkeepers and common carriers, may serve or exclude whomever he pleases. Madden v. Queens County Jockey Club, 296 NY 249, 72 NE2d 697, 1 ALR2d 1160 (opinion by Justice Fuld).

The annotation in 1 ALR2d 1165 discusses "Exclusion of person (for reason other than color or race) from place of public entertainment or amusement."

Appeal — *order to strike pleading.* In the Kansas Supreme Court case of Pulliam v. Pulliam, 163 Kan 497, 183 P2d 220, 1 ALR2d 418, the opinion was by Justice Parker. A motion was made to strike a petition from the files as not properly verified, because verified before the plaintiff's attorney. Before a hearing of the motion, plaintiff filed a petition the verification of which was not open to question. An appeal was taken from a denial of the motion.

It was held that the court should determine whether it had jurisdiction to entertain the appeal, even though its jurisdiction was not questioned by the appellee; that while an order strik-

ing a petition from the files has the finality requisite to an appeal, an order overruling the motion does not, and is not within a statute permitting appeals from orders overruling a demurrer.

The subject of the annotation in 1 ALR2d 422 is "Appealability of order entered on motion to strike pleading."

Automobiles — *collision caused by swaying of vehicle.* Justice Allen M. Stearne in Seader v. Philadelphia, 357 Pa 369, 54 A2d 701, 1 ALR2d 162, wrote the opinion holding that the act of the driver of a tractor-trailer after moving slowly past two boys standing in the street about a foot away from the vehicle, in swerving, in a direction away from them, in order to pass a parked vehicle, thereby causing the trailer to sway and strike one of them, knocking him under its wheels, may not be found by a jury to have been negligent where there is no showing that the result of his act might have been anticipated by him.

See the annotation in 1 ALR 2d 167 on the question "Liability for collision due to swaying or swinging of motor vehicle or trailer."

Bailments — *loss of customer's property.* In Theobald v. Satterthwaite, — Wash2d —, 190 P2d 714, 1 ALR2d 799, opinion by Chief Justice Mallery, it

"But isn't it nicer to say, 'My Dearest Darling Sirs'?"

was held that the owner of a beauty shop is not liable for the loss of a patron's coat stolen from the reception room if not aware that the patron had left the coat there while having a treatment.

An annotation in 1 ALR2d 802 discusses "Liability for loss of hat, coat or other property deposited by customer in place of business."

Confessions — *suppression before trial.* The Federal rule is stated in Re Fried, 161 F2d 453, 1 ALR2d 996, opinion by Circuit Judge Frank. It was there held that a confession obtained in violation of constitutional rights should be suppressed by the district court upon proper application therefor before indictment.

Majority and minority views are presented in the annotation in 1 ALR2d 1012.

Contracts — *provision for performance after death.* In Howe's Estate, 31 Cal2d 395, 189 P2d 5, 1 ALR2d 1171, opinion by Justice Edmonds, it was held that an agreement between the owner of a business and its manager under which, on the owner's death, the manager is to have the business "as additional compensation for his services," the manager's heirs not to have any interest in the business if he should predecease the owner, and the agreement to be subject to termination upon ninety days' notice is a valid contract, not a testamentary disposition in violation of the Statute of Wills.

An annotation on the question "Provision for post-mortem payment or performance as affecting instrument's character and validity as a contract" appears in 1 ALR2d 1178.

Contributory negligence — *of state.* Damage was caused to a state-owned drawbridge by the concurring negligence of the defendant's truck driver and the bridge tender, who was an employee of the state highway commission.

The court held that since the state could not be held answerable for the negligence of its

servants because of nonexistence of the relationship of respondeat superior, it could recover the property damage caused by the defendant's negligence even though its own servant was guilty of contributory negligence. Miller v. Layton, 133 NJL 323, 44 A2d 177, 1 ALR2d 825 (opinion by Chief Justice Brogan).

The annotation in 1 ALR2d 827 discusses "Contributory negligence as defense to action by state, United States, municipality, or other governmental unit."

Elections — *injunction against declaring result.* A citizen and taxpayer, claiming that his property right in his liquor business would be jeopardized by canvassing the vote and announcing the result of a local-option election alleged to be illegal by reason of fraud and intimidation of voters, sought to enjoin such canvassing and announcement.

The court held that as the complainant could seek an injunction, on the ground of illegality of the election, against enforcement of its mandate, no such irreparable damage would be inflicted by the canvassing and announcement of result as would call for injunctive relief. O'Neil v. Jones, — Tenn —, 206 SW2d 782, 1 ALR2d 581 (opinion by Justice Gailor).

Annotation: "Power to enjoin canvassing votes and declaring result of election." 1 ALR2d 588.

Eminent Domain — *valuation of improvements and fixtures.* In United States v. New York, 165 F2d 526, 1 ALR2d 870, opinion by Federal Circuit Judge L. Hand, it was held that it is permissible in assessing the value of property in condemnation proceedings to determine separately the "site" value of land, on the assumption that improvements are absent, and the value of improvements such as buildings, sheds, piers, and refrigerating lines, where it is possible to determine the "site" value without such improvements.

An extensive annotation on the question "Eminent domain: valuation of land and improvements and fixtures thereon separately or as unit" appears in 1 ALR2d 878.

Entireties — *ineffective estate as creating right of survivorship.* A husband deeded to his wife a half interest in land owned by him, with the expressed intention that they should hold as tenants by the entirety. Since the four unities of interest, time, title and possession essential to an estate by the entirety or a joint tenancy were not present, the deed was effective only to create a tenancy in common.

Nevertheless, to give effect to the intention of the parties, the deed was held to give the wife a right, by survivorship, to the

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husband's one-half interest. Runions v. Runions, — Tenn —, 207 SW2d 1016, 1 ALR2d 242 (opinion by Justice Tomlinson).

See the annotation in 1 ALR 2d 247.

Estoppel — *governmental agencies.* Justice Stukes of the South Carolina Court prepared the opinion in Powell v. Police Ins. and Annuity Fund, 210 SC 136, 41 SE2d 780, 1 ALR2d 330. The board of commissioners of a state insurance and annuity fund for peace officers accepted as a contributor a deputy sheriff appointed pursuant to statutory authority to serve at the plant of a private corporation, by whom his salary was paid. Three years after enactment of the statute establishing the fund, an amendment was adopted increasing monthly dues and premiums, making certain changes in schedules of benefit payments, and limiting benefits to peace officers who receive their salaries from the state or any of its political subdivisions. The board continued thereafter to accept assessments from the deputy sheriff. It was held that the amendment did not operate retroactively so as to expel from the plan those already accepted by the board as eligible, and that, even upon the assumption that the board of commissioners was a branch of the state government and so subject to the limitations imposed in the case of the sovereign upon the doctrine of estoppel, the board was estopped to deny liability to the deputy sheriff for disability benefits.

A valuable comment annotation in 1 ALR2d 338 shows the various state and Federal applications of this rule.

Executors and Administrators — *conclusiveness of account.* The Minnesota Court in Re Enger, 225 Minn 220, 30 NW2d 694, 1 ALR2d 1048, opinion by Justice Peterson, held that an order approving a trustee's account is not conclusive of the permissibility of self-dealing not disclosed by the account or petition for its allowance.

The title to the annotation in 1 ALR2d 1060 is "Conclusiveness of allowance of account of trustee or personal representa-

tive as respects self-dealing in assets of estate."

Federal Crop Loans — *construction and application.* In Piowaty v. Regional Agricultural Credit Corp., — Fla —, 43 So 2d 94, 1 ALR2d 705, opinion by Justice Barns, it was held that arbitrary refusal of a Federal agency to issue a certificate of discharge of a crop loan note upon the maker's compliance with specified conditions is an affirmative defense to be pleaded by the maker in an action thereon.

The annotation in 1 ALR2d 712 discusses "Federal crop loans."

Federal Employers' Liability Act — *"loaned servant" doctrine.* A railroad company, for the convenience of the government in the operation of a munitions plant in having available a switching crew at all times, assigned a crew to operate a plant switch engine on tracks in the plant connected with the railroad's tracks, in lieu of sending its own switch engines into the plant to do the necessary switching on call. The crew received their pay from the railroad company, which was reimbursed by the government, and operated under the railroad company's rules.

One of the crew, knocked by a

"'I do'—Now will you use your influence so Mr. Percival will see me?"

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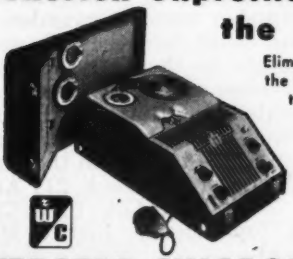

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light standard near the track from the side ladder of a moving car which he had boarded in the dark, brought an action against the railroad under the Federal Employers' Liability Act for the injuries sustained, alleging a breach of the duty to exercise reasonable care to furnish a reasonably safe place to work.

The railroad's contention that the crew had become plant employees, under the "lent servant" doctrine, was rejected. Terminal Railroad Asso. v. Fitzjohn, 165 F2d 473, 1 ALR2d 290 (opinion by Circuit Judge Collet).

See the annotation in 1 ALR 2d 302.

Gifts — *of savings account.* Parents opened a bank savings account in the name of their son and thereafter made several deposits to the account and retained possession of the passbooks at all times except on six occasions when they permitted the son to make withdrawals, after which the passbooks were returned to the parents. The son's name was signed to a signature card by his sister. The rules of the bank required the presentation of the passbooks when each deposit or withdrawal was made and a written order of the depositor was required in making the withdrawal.

It was held that there was no completed gift to the son of the sums deposited, as there was no delivery of the passbooks to the son. Hence, the parents were entitled to the proceeds of the account as against the estate of the son after the latter's death. Ruffalo v. Savage, 252 Wis 175, 31 NW2d 175, 1 ALR2d 534 (opinion by Justice Barlow).

The title to the annotation in 1 ALR2d 538 is "Opening savings account in sole name of another, without complete surrender of passbook, as a gift."

Income Tax — *on payments to spouse.* Pursuant to contract between husband and wife, the former paid the latter one third of the net proceeds of sales of his lands in lieu of and as consideration for her release of her inchoate dower rights. In one instance a vendee paid a sum to her three months after the husband's conveyance subject to dower, the wife executing a separate instrument relinquishing dower. By statute the wife could not convey her dower rights except by relinquishing them to her husband's vendee.

The court held that all such payments to the wife, both by the vendee and by the husband, amounted to gifts to her by the husband, and that such sums were income taxable to the husband. Le Croy v. Cook, 211 Ark 966, 204 SW2d 173, 1 ALR2d 1032 (opinion by Justice McHaney).

The annotation in 1 ALR2d 1037 discusses "Income tax treatment of payment to spouse for relinquishment of inchoate marital rights in property of other spouse."

Insurance — *effect of violation of law by insured.* The Illinois Supreme Court in Carmack v. Great American Indemnity Co. 400 Ill 93, 78 NE2d 507, 1 ALR2d 402, opinion by Justice Gunn, held that a boy under sixteen was illegally employed does not preclude the employer from collecting from his workmen's compensation insurer the additional compensation given by statute in the case of persons under sixteen illegally employed.

See the annotation on this question in 1 ALR2d 407.

Insurance — *evidence of proof of death.* The California Court in Bebbington v. California Western S. L. Ins. Co. 30 Cal2d 180, 180 P2d 673, 1 ALR2d 361, opinon by Carter, J., held that hearsay statements by third persons that insured was killed in the crash of a military airplane were filed by the beneficiary with the proof of death, at the request of the insurer, does not render them admissible in evidence against the beneficiary suing on a policy limiting the liability of the insurer in case of death resulting from airplane travel other than as a fare-paying passenger.

The title to the annotation in 1 ALR2d 365 is "Admissibility against beneficiary of life or accident insurance policy of statements of third persons included in or with proof of death."

Insurance — *who is member of insured's "family" or "household."* A floater insurance policy was issued to the insured covering personal property used or worn by the insured and members of the insured's family of the same household, while in all situations, with certain exceptions. While the insured's eighteen-year-old son was in the military service, personal property belonging to the latter was stolen from his military quarters. The son was living at the parental home at the time he was inducted into military service, and intended to return there when discharged, at the end of his eighteen months' period of service.

The court ruled that at the time of the theft the insured's son was protected by the policy, that the provision "in all situations" covered the property stolen regardless of its location, and that admission of the insured's testimony that the son intended to return to the parental home on his discharge was not error. Central Mfrs.' Mut. Ins. Co. v. Friedman, — Ark —, 209 SW2d 102, 1 ALR2d 557 (opinion by Justice Holt).

Annotation: "Who is member of insured's 'family' or 'household' within coverage of property insurance policy." 1 ALR2d 561.

Judgment — *beginning of interest period.* A practical question was decided in Briggs v. Pennsylvania Railroad Co. 164

F2d 21, 1 ALR2d 475, opinion by Circuit Judge Chase. After rendition of a verdict for plaintiff in a Federal court, the court granted defendant's previously made motion to dismiss for want of jurisdiction by reason of an alleged lack of capacity to sue. On appeal, the dismissal was held erroneous, and the trial court was directed to enter judgment for plaintiff on the verdict, nothing being said as to the inclusion of interest.

It was held (1) that a right to interest from the date of the verdict to that of the judgment of dismissal could not be predicated on a statute which provides that interest is to be calculated "from the date of the judgment," since judgment could not be entered on the verdict while the motion to dismiss was pending; (2) that such statute conferred no right to interest from the date of the judgment of dismissal; (3) that inclusion of such interest in the judgment entered pursuant to the mandate was precluded by the terms of the mandate; and (4) that the appellate court would not, after term, recall its mandate for the purpose of amending it so as to direct its entry nunc pro tunc as of the date of the judgment of dismissal.

The subject of the annotation in 1 ALR2d 479 is "Date of verdict or date of entry of judgment thereon as beginning of interest period on judgment."

"But, darling, what will happen to my reputation as a lawyer if this sort of thing gets out?"

Levy and Seizure — *interest under executory contract.* In Eckley v. Bonded Adjustment Co. — Wash2d —, 190 P2d 718, 1 ALR2d 717, opinion by Justice Beals, it was held that where after husband and wife had taken possession of land under an executory contract of purchase and the husband had left the wife, the husband's brother took possession and continued making payments on the contract, his rights are subordinate to the lien of a prior judgment recovered against the husband and wife.

See the annotation in 1 ALR 2d 727 which discusses "Interest of vendee under executor contract as subject to execution, judgment lien, or attachment."

Libel and Slander — *limitation of action.* In Hartmann v. Time, Inc. 166 F2d 127, 1 ALR 2d 370, opinion by Circuit Judge Biggs, it was held that in states in which an issue of a magazine is regarded as a single publication of a libel therein, creating only a single tort, reprintings do not set the statute of limitations to running afresh; but the contrary is the case in states following the rule that a new publication occurs each time a libel is brought to the attention of a third person.

See the annotation in 1 ALR 2d 384 on the question " 'Publication' of libel for purposes of statute of limitations."

Limitation of Actions — *effect of setoff.* In an action to recover on a promissory note and to foreclose a mortgage securing it, defendant set up as an offset or recoupment his claims against plaintiff for money loaned and labor performed, against which, as independent causes of action, the statute of limitations had run. The labor was performed and the loans made on occasions other than that of the signing of the note, and the amount of the claim therefor was not agreed upon at that time.

It was held that as defendant's claim did not arise out of the contracts or transactions which formed the basis of plaintiff's claim it was in the nature of a counterclaim and not a recoupment. Hence, being barred by limitation, it could not be urged in defense. Francisco v. Francisco, — Mont —, 191 P2d 317, 1 ALR2d 625 (opinion by Justice Choate).

The conflict of authority on this point is discussed in the annotation in 1 ALR2d 630.

Mistake in Quantity of Land — *relief available.* A contract provided for the sale for a gross sum of land "described approximately" as "275 acres . . . known as the farm" of a named person, with a reference to a recorded deed for a fuller description, and recited that the property had been inspected by the vendee or her agent and was purchased solely as a result of the inspection. On discovering that the tract contained only 200 acres, the vendee commenced

this action to recover the portion of the purchase price paid, on the ground of mutual mistake as to the acreage.

It was held that although the contract was for a sale in gross, the vendee was entitled to the rescission sought, as the discrepancy in quantity was unreasonable. The inspection of the farm by the vendee or her agent did not preclude the relief where there was reliance upon the mistaken belief as to quantity. Enequist v. Bemis, 115 Vt 209, 55 A2d 617, 56 A2d 5, 1 ALR2d 1 (opinion by Chief Justice Moulton).

An extensive annotation under the title "Relief by way of rescission or adjustment of purchase price for mutual mistake as to quantity of land, where the sale is in gross" appears in 1 ALR2d 9.

Municipal Bonds — *power to refund.* The Florida Supreme Court in State v. Miami, 155 Fla 180, 19 So2d 790, 1 ALR2d 132, opinion by Justice Thomas, held that the absence of specific statutory authority does not preclude a city from refunding its bonded indebtedness on more favorable terms, where it is expressly empowered to redeem its bonds and to covenant for their redemption.

The annotation in 1 ALR2d 134 discusses "Power of governmental unit to issue bonds as implying power to refund them."

Parents — *duty to support adult defective child.* A complaint by a wife suing her husband, who lived apart from his family, for necessaries and services in caring for a defective child who was, during the period in question, more than twenty-one years of age, was held to state a cause of action. Wells v. Wells, 227 NC 614, 44 SE2d 31, 1 ALR2d 905 (opinion by Justice Winborne).

An extensive annotation on "Parent's obligation to support adult child" appears in 1 ALR2d 910.

Parties — *joinder of claimants against carriers.* A railroad company collected from intrastate passengers fares in excess of those fixed by the state commission. This it did under authority of an order of the Interstate Commerce Commission, which was subsequently set aside by the courts.

Certain persons who had paid the excessive fares brought a declaratory suit in equity for the overage, and to avoid the objection that the requisite jurisdictional amount was not involved, claimed to sue on behalf of themselves and all others similarly situated, for a declaration of the railroad company's liability for the excess amounts collected.

It was held that the court would not entertain the suit, either on the ground that it would prevent a multiplicity of actions at law or on the ground that the railroad held such amounts as a constructive trustee. Covert v. Nashville, C. & St. L. R. Co. —

Tenn —, 208 SW2d 1008, 1 ALR 2d 154 (opinion by Justice Burnett).

The annotation in 1 ALR2d 160 discusses "Joinder or representation of several claimants in action against carrier or utility to recover overcharge."

Possession — *as notice of unrecorded title.* The opinion in the Oklahoma Court in Bell v. Protheroe, — Okla —, 188 P2d 868, 1 ALR2d 315, was prepared by Justice Luttrell. The owner of rented property contracted with a stepdaughter with whom he lived and who looked after the property, to deed it to her in consideration of past assistance if she would turn over the rents to him during his lifetime. Conformably to the contract he executed a deed which was placed in escrow for delivery to the stepdaughter at his death. The stepdaughter thereupon notified the tenant that she had purchased the property and assumed full possession and control.

Subsequently the grantor, while ill at the home of a sister-in-law, executed a series of conveyances to her (the latter being to correct defects of description) and caused the latest of them to be recorded. The sister-in-law made no inquiry of the tenants regarding the ownership of the property.

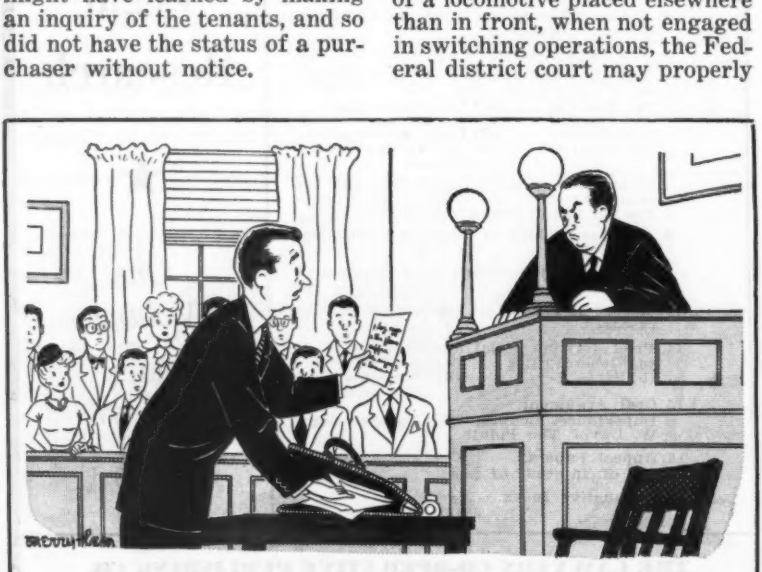
The grantor died, the escrow deed was thereupon delivered, and the stepdaughter brought suit against the sister-in-law to quiet title.

"Well, well, if it isn't Judge Zilch! I knew you made a mistake when you didn't give me life imprisonment!"

It was held that, construing the contract and deed together, the grantor had not reserved a life estate to himself, and therefore that the stepdaughter had an immediate right of possession subject to an obligation during the grantor's lifetime to turn over the rents to him; that in consequence she was in constructive possession through the tenants; and that the sister-in-law was accordingly chargeable at the time of the conveyance to her with notice of the stepdaughter's title of which she might have learned by making an inquiry of the tenants, and so did not have the status of a purchaser without notice.

An important annotation on the question "Continued possession of tenant as constructive notice to third person of unrecorded transfer of title of original lessor" appears in 1 ALR2d 322.

Railroads — *"lookout" statute.* In Alabama Great So. R. R. Co. v. Brookshire, 166 F2d 278, 1 ALR2d 612, opinon by Federal Circuit Judge Martin, it was held that under a state lookout statute imposing absolute liability for injuries inflicted by a train or cars moving by means of a locomotive placed elsewhere than in front, when not engaged in switching operations, the Federal district court may properly



"1 doz. eggs, 2 lbs. flour—my wife has been messing around with my briefcase again!"

direct a verdict in favor of one injured at a street crossing in a collision with cars being pushed from an industrial plant to the railroad's own switchyards some 2½ miles distant.

The conflicting decisions on this question are discussed in the annotation in 1 ALR2d 621.

Robinson-Patman Act — *discounts under.* In Federal Trade Com. v. Morton Salt Co. — US —, 92 L ed (Adv 948), 68 S Ct 822, 1 ALR2d 260, opinion by Justice Black, it was held that quantity discounts on a manufacturer's sales in interstate commerce, save as they fairly reflect cost savings to the seller or are a good-faith effort to meet competition, are, if they give the large buyer a competitive advantage over the small buyer, illegal under the Robinson-Patman Act (49 Stat 1526, c 592, 15 USC § 13), although available to all on equal terms.

The title to the annotation in 1 ALR2d 276 is "Discounts permissible under Robinson-Patman Amendment to Clayton Act."

Statute of Frauds — *writings prior to oral agreement.* In Pitek v. McGuire, 51 NM 364, 184 P2d 647, 1 ALR2d 830, opinion by Chief Justice Brice, it was held that a memorandum on a check stating it was to be applied to the purchase of property "on E. Central Ave.," is insufficient to satisfy the statute of frauds where the seller owned six contiguous lots on that street.

See the annotation on this question in 1 ALR2d 841.

Succession Taxes — *joint estate.* One taking as survivor property which she and her deceased husband had held as tenants by the entirety, and, as dower and statutory allowance, property set off out of his estate to her, was held bound to contribute therefrom a pro rata share of the Federal estate tax, under a state statute, enacted shortly after the United States Supreme Court had held that a state may fix the incidence of the Federal estate tax and after the state courts had held that none of such tax was payable out of property set aside to a widow as dower, which provided that except as the will may otherwise direct, the burden of estate and inheritance taxes "shall be spread proportionately among the distributees and/or beneficiaries of the estate, so that each shall bear his proportionate part of said burden." Terral v. Terral, 212 Ark 221, 205 SW2d 198, 1 ALR2d 1092 (opinion by Justice Robins).

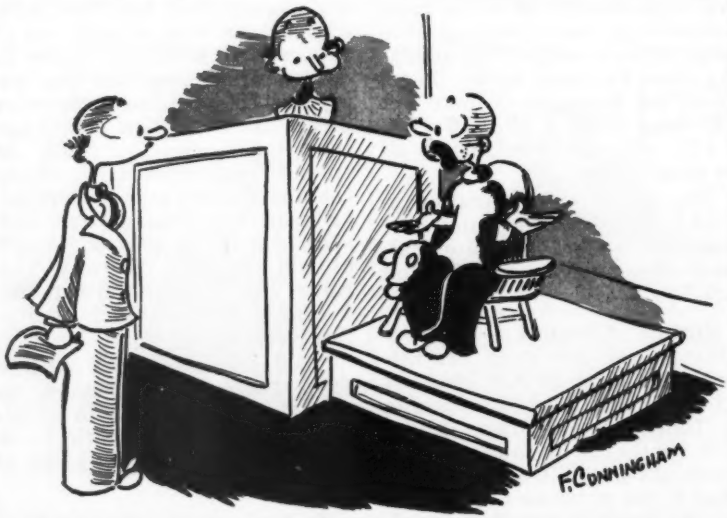
The annotation in 1 ALR2d 1101 discusses "Succession or estate tax as affecting or as affected by estate by entirety or other joint estate with right of survivorship."

Torts — *construction of Federal Tort Claims Act.* Under the law of the state in which a fatal

accident occurred, the bringing of an action for wrongful death within a year was a condition of the right of action rather than a limitation on the remedy. Notwithstanding this fact, and although the law of the state determines the existence of a cause of action under the provision of the Federal Tort Claims Act that judgment may be rendered against the United States on claims based on the negligent or wrongful act or omission of an employee under circumstances where a private person would be liable, it was held that an action brought under the act more than a year after death was maintainable where brought within the time limit prescribed by the act. State, Use of Burkhardt v. United States, 165 F2d 869, 1 ALR2d 213 (opinion by Judge Parker).

An extensive annotation includes the cases which have construed this important act. 1 ALR2d 222.

Wills — *"proceeds" as principal or income.* A testator bequeathed the residue of his estate in trust during his widow's lifetime, with directions to pay the "income" therefrom in equal shares to the widow and his two



"So I pumped sixteen slugs into him—I'm hard of hearing!"

daughters by a former marriage. At the widow's death, the corpus was to be paid to the two daughters. He further provided that should one third of the "proceeds" of the trust prove inadequate to support the widow in her accustomed style, the trustee should pay to her, "from the proceeds of the said trust," such additional sums as might be needful, in which case the daughters' share "of the proceeds of the said trust" should be decreased accordingly.

The gift over to the daughters at the widow's death was held to require the term "proceeds" to be read as meaning income, although elsewhere in the will the term was used to indicate corpus. In consequence, it was held that although the entire trust income was insufficient for the widow's support, there could be no encroachment upon the corpus for the purpose, and that to decree otherwise would be a taking of property without authority of law and therefore without due process. Re Cosgrave, — Minn —, 31 NW2d 20, 1 ALR2d 175 (opinion by Justice Peterson).

See the annotation on this question in 1 ALR2d 194.

Naturally Skeptical

The good old country lawyer had a jury out all night after a long, hard trial. He left his bright, young assistant to entertain the court attaches with jokes while he came home all worn out and prepared for a good night's sleep, but no sooner had he retired than the phone beside his bed buzzed shrilly.

He nudged his wife: "Listen, Ma, see who it is; say you expect me soon, or anything you think of."

The wife answered the phone. "My husband is not at home," she said.

"Well, this is his assistant," rattled a voice in the receiver. "The jury has returned and the circuit judge insists on the motions being made right now so he can catch the early morning train."

The old lawyer whispered some instructions to his wife, which she repeated to the bright, young assistant. "Say that, and I'm sure you will reserve all your rights," she concluded.

"Thanks very much," said the alert, young assistant on the phone, "but before I take your advice, tell me something: Is that gentleman who seems to be with you authorized to advise me?"

Contributor: Herbert B. Sansom, Court Reporter, New York, N. Y.

Drafting Problems in Wills under the Federal Revenue Act of 1948

By AUSTIN FLEMING of the Chicago Bar

Condensed from Chicago Bar Record, July, 1948

THE PURPOSE of this discussion is to consider the effect of the Federal Revenue Act of 1948 on specific provisions frequently employed in the preparation of wills.

Lawyers arrange wills in different ways, but one of the more common arrangements is that which begins with a payment of debts and tax clause, followed by provisions covering personal effects and legacies, and then a residue clause which either gives the property outright or places the estate in trust with particular distributive provisions. Where the residue is placed in trust, the dispositive provisions are followed by various administrative clauses, such as a spendthrift clause, facility of payment clause, undistributed income clause, undivided interests clause, trustee's powers, successor trustee provisions, and finally, by the designation of an executor.

TAX CLAUSES

As to the tax clause, the form most frequently used by attorneys is one which directs the executor to pay all death taxes, both estate and inheritance, from the residuary estate without seeking reimbursement from or charging any person for any part of the taxes so paid. This form of clause would still appear to be appropriate and proper under the new law, subject only to these observations: Some tax clauses specify that death taxes shall be treated as expenses of administration chargeable against the estate generally. With the new concept of "adjusted gross estate" appearing in the new law, which means in essence the gross estate less expenses of administration and widow's award, such a clause may create confusion as to whether the marital fund is or is not intended to bear a part of the tax burden. To avoid any question, would it not be preferable to direct specifically that all such taxes should be paid or provided for out of the residuary estate, in terms?

Also, care must be exercised in the use of waiver of reimbursement clauses, particularly in cases where section 826(d) of the Internal Revenue Code applies, giving the executor of an

estate a right of reimbursement with respect to appointive property unless the donee directs otherwise in his will. Where a marital trust is created with a general power in the surviving spouse to appoint the corpus by will, the value of the marital assets will, of course, be included in such spouse's estate at the time of death for Federal estate tax purposes. In many cases the spouse's estate will not be sufficient to pay the tax so assessed, in full, or the spouse may not wish her entire estate to be used for the payment of taxes imposed by reason of the inclusion of the marital fund in her taxable estate. In such cases it is important to see that the tax clause in the will of the surviving spouse does not waive any reimbusement rights conferred by section 826(d) of the Code. An additional sentence in the tax clause to the following effect may be desirable:

This paragraph shall not be construed as a waiver of any right of reimbursement of any such taxes imposed with respect to any property over which I may have a power of appointment, and to which reimbursement the Executor of my estate would otherwise be entitled by law.

The personal effects and legacy clauses raise no special problems. Such gifts, when made to the surviving spouse, will qualify for a marital deduction and

"Your wife just called to tell you she's in jail for speeding and would you get her out . . ."

should not be overlooked in making calculations.

The Marital Fund

As to clauses establishing the marital fund itself, there is at the outset the question of whether there is any objection to tying the amount of the fund to the exact amount allowable as a marital deduction, particularly in view of the fact that there may be a long lapse of time before values for Federal estate tax purposes are finally determined. No legal objection is seen to such a provision. In fact, it approximates most nearly the community property system without any undershooting or overshooting. The only problem presented is one of computation and the necessity for making required adjustments when final figures are obtained. This is not easy, of course, but it is not essentially different from the familiar process of arriving at the exact amount of a charitable gift expressed in the terms of a percentage of the residue of an estate. The indeterminate form of such a provision nevertheless appears to have troubled some attorneys, and they have indicated a preference for a definition of the marital fund in terms of a dollar amount. Where this method is employed, it will be necessary to review the will frequently and by codicil or new instrument make necessary upward or downward revisions, as the value of the estate changes from time to time.

Estates over $60,000 in value but less than $120,000 present a special drafting problem in creating a marital trust of the proper size. Where the balance of the estate is also left in trust for the benefit of the spouse or descendants, it will ordinarily not be desired to create a marital fund greater than the difference between the tax exemption and the adjusted gross value of the estate. The following provision may be considered in such cases:

. . . an amount equal to fifty per cent (50%) of the value of my adjusted gross estate as finally determined for Federal estate tax purposes (but in no event in excess of the difference between the value of my adjusted gross estate and the amount of the exemption allowed for the purpose of determining the so-called additional or tentative Federal estate tax), less the aggregate amount of marital deductions, if any, allowed by reason of interests in property passing or which have passed to my wife otherwise than by the terms of this paragraph of my Will.

Most forms for the establishment of a marital trust fund operate as a separate bequest ahead of the residuary article. The reasons for this arrangement are twofold: to provide the maximum deduction with the greatest tax savings through the fact that by not being a part of the residuary estate, it bears no share of taxes; and to obviate the necessity for the application of the very difficult algebraic

computation required if taxes are to be taken into account in arriving at the amount of the marital fund. The amount of the tax cannot be computed until the amount of the deduction has been determined, and the amount of the deduction cannot be determined until the amount of the tax has been computed. The problem is further complicated by differences in rates and methods of computation between the basic Federal estate tax and the additional Federal estate tax, and between each of them and State inheritance taxes.

It has been asked why the marital gift must take the form of a bequest ahead of the residuary and whether it is not possible to provide that the residue should be divided into separate trusts with the trustee, rather than the executor, making allocation, and to direct the tax burden to be shifted to the non-marital fund. No reason is seen why this arrangement cannot be followed with the same result, although it would seem that the net effect is to make the marital fund in fact a special trust ahead of what is really the residuary. The important thing is that in order to qualify under the statute, the marital fund must be a distinct and separate trust. It will not do to place the residue in trust with the income payable entirely or in part to the surviving spouse for her life and a general power of appointment in the spouse over one half of the corpus at her death. The law is clear that in order to qualify for a marital deduction, the power of appointment must apply to the entire corpus of the trust.

In whatever way the attorney chooses to phrase the marital clause, he should not overlook negativing expressly the operation of paragraph (C) of the new law which says in effect that if interests passing to the spouse may be satisfied out of ineligible assets, the value of such interests will be reduced by the aggregate value of such ineligible assets. The surest way to negative this provision is to specify that in no event shall the executor or trustee satisfy the gift out of assets or proceeds of assets with respect to which a marital deduction would not be allowed if so included.

Whether it is advisable to provide for a marital deduction in every case of a married person with an estate larger than that of his spouse, and, if so, whether the maximum marital deduction should be claimed, are estate planning questions, the exploration of which would take us afield from our purpose. Suffice it to say that in the estate of the first spouse to die admittedly large tax savings are obtainable through the device of marital deduction. The alternative of not providing for a marital fund may be a renunciation of the will and the taking of statutory benefits which will qualify for a marital deduction. Each case

must, of course, be considered on its own facts and particular circumstances, but in many cases it will undoubtedly prove advantageous to claim the largest possible amount of marital deduction, even though it may appear that by doing so the combined tax bills in the two estates are increased. The value of the use of the property by the surviving spouse in the interim more than offsets the added cost to the remaindermen, and many changes in values, tax laws and rates may occur in the meantime which will invalidate the initial calculations and assumptions as to the amount of taxes payable upon the death of the surviving spouse.

COMMON DISASTER CLAUSES

Generally speaking, if it is advisable to claim a marital deduction at all, it would seem to be equally advisable whether the spouse survives by one day or many years, and accordingly, where a marital fund is established it follows that the draftsman will not ordinarily wish to condition the gift on survival for any particular period of time. There are two exceptions to this conclusion: One relates to the case of outright gift of the entire estate to the surviving spouse. In such case section 812 (c) of the Internal Revenue Code as amended by the new law, dealing with credit for previously taxed property, provides no

"Could I get alimony from my husband without divorcing him?"

deduction for any property received from a previously deceased spouse. Should a surviving spouse who is given the entire estate outright die within a short period after the death of the first spouse, the entire estate, and not just half, would be taxed again in the estate of the surviving spouse. In such a situation, it would seem that the draftsman would wish to consider the inclusion of a six-month common disaster clause, in order to avoid double taxation of the estate should the surviving spouse die within that period. The second exception applies where the estates of the two spouses are so nearly equal in amount that the combined tax bills on their deaths will be much greater through the use of the marital device than would otherwise be the case. In those cases, should death of the surviving spouse occur within six months, it might be advantageous not to have the marital gift apply and to have the estate of the spouse first dying taxed as though he were the sole survivor.

The requirements of the statute with respect to a power of appointment in the surviving spouse over the entire marital fund are clear and require no special comment. However, the question does arise as to whether it may be provided that the trustee may rely on a will admitted to probate in any jurisdiction without waiting for the period of contest to elapse; and also assume that the spouse has died intestate in case no will is found within a certain number of months after death. Such a clause operates only after the death of the spouse, is purely procedural and in no way affects substantive rights in case a will is later found and admitted to probate. Accordingly, no objection is seen to the use of such a clause and it has the value of facilitating administration.

It is now clear that the inclusion of provisions naming takers in default of the exercise of the power of appointment will not defeat the right to an estate tax marital deduction otherwise allowable. The Senate Committee report, and more recently an explanatory letter of the Deputy Commissioner dated May 4, 1948, support this conclusion.

All of the Income

The statute says that the marital deduction is available with respect to a marital trust only if the surviving spouse is entitled for life to "all of the income" from the corpus of the trust, payable annually or at more frequent intervals. Does "all of the income" mean gross income, or income after deducting trustee's fees and ordinary expenses? The Senate Committee report explains that the term "income" is used in the same sense as that in section 162 of the Internal Revenue Code relating to the taxation of income of estates and trusts. That sec-

tion speaks of the "net income" distributable to a beneficiary and states that net income in the case of estates and trusts is to be computed on the same basis and in the same manner as in the case of an individual, with certain exceptions. From this it would appear that the phrase "all of the income" does not mean gross income, but something less. This almost has to be the case; otherwise the trustee would be unable to pay taxes, insurance premiums, and other customary charges and expenses incurred in the management of the trust property. But section 162 of the Code deals with income only for income tax purposes and not trust accounting purposes. It is believed that the statutory language in the new Act should be construed as synonymous with "net income" as determined by applicable State law. However, until the matter is clarified by official ruling or regulation, many attorneys will be hesitant about using the phrase "net income" and will prefer to use the statutory words "all of the income" or simply, "the income." From a trust accounting point of view, the result should be the same whether the words "all of the income," or "the income," are used, for the Illinois Principal and Income Act defines income as gross income less statutory charges.

There is one word of caution. Should not the same terminology employed regarding the income of the marital fund also be used in connection with the income from the non-marital fund? To say "all of the income" in the marital provisions and then to use the phrase "net income" in the residuary provisions may raise construction problems as to the testator's intentions. It would seem preferable to use the same expression in all references throughout the will, so that no confusion as to intention will result.

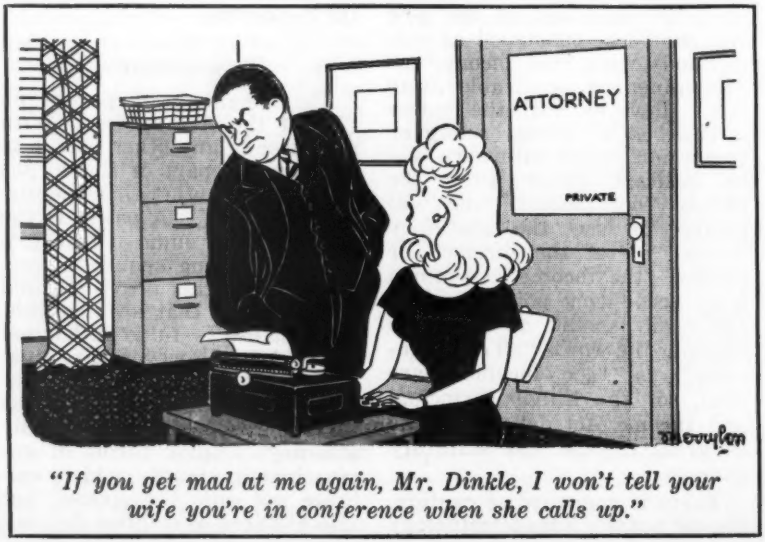
The requirement for annual or more frequent distributions of income is clear. It means, of course, that no accumulation provisions, discretionary or mandatory, will be permitted if the marital fund is to qualify for tax deduction.

ENCROACHMENT

The langauge of paragraph (F) of the Act reads: "With no power in any other person to appoint any part of the corpus to any person other than the surviving spouse." A power in the trustee to pay sums of principal to the surviving spouse is compatible with this provision, and it is believed that an encroachment clause is fully authorized by the Act. However, care must be used to limit the scope of the encroachment clause to the surviving spouse alone. Many attorneys employ forms of encroachment clauses which embrace not only the spouse, but also children and other depend-

ents, and such clauses as applied to marital funds will, of course, require revision. The argument has been made that as to minor children the surviving spouse has a legal obligation of support and that this circumstance ought to justify the inclusion of such children within the embrace of a marital encroachment clause. However, this would seem hazardous until an official ruling or regulation is issued sanctioning it. The only safe course is to confine to the spouse alone the encroachment clause governing the marital fund.

One further comment may be made as to the encroachment clause. Where the surviving spouse is also the beneficiary of a non-marital fund and an encroachment clause is included in the non-marital, as well as the marital, fund for the benefit of the spouse, a question may arise as to the corpus to which the trustee should first have recourse. Generally speaking, it will be desired to deplete the marital fund first. Accordingly, the draftsman should consider including an additional phrase in the encroachment clause governing the non-marital trust to the general effect that the trustee should take into consideration all other income and cash resources available to the spouse



"If you get mad at me again, Mr. Dinkle, I won't tell your wife you're in conference when she calls up."

for the purpose from all sources "including the income and principal of the marital trust."

A power in the spouse to withdraw all or any part of the corpus of the marital fund on request would also appear to come within the statutory language of paragraph (F), "with power in the surviving spouse to appoint the entire corpus free of the trust (exercisable in favor of such surviving spouse. . . .)." The Senate Committee report indicates that the term, "power to appoint" as used in the law includes any power which in substance and effect is such a power regardless of the nomenclature used in creating the power and local property law connotations. Accordingly it is believed that a power of withdrawal in the surviving spouse may safely be included in marital trust fund provisions.

Next is the question of the compatibility of the facility of payment or disability clause which gives the trustee the privilege of paying income otherwise distributable to a person under legal disability or other incapacity, in various ways, as through a legal guardian or conservator, or by the trustee itself applying the income for the use of the beneficiary. The present feeling is that such a clause is unobjectionable and will not defeat the right to an estate tax marital deduction provided that there is in such a clause no requirement or discretion in the trustee to accumulate any income not needed by the beneficiary. Any provision for accumulation of income may, as already indicated, forfeit the deduction, but a provision which directs that all income distributable to a beneficiary shall be paid out by the trustee in such one or more of the optional methods usually provided, would seem to be proper and fall within the statutory language of the spouse being "entitled" to all of the income. However, all such clauses should be reviewed to make certain that they permit no discretion in the trustee to accumulate and perhaps also to narrow the optional methods of making distribution to the spouse directly, or to her legal representative, or by the trustee itself using such income for the benefit of the spouse.

Spendthrift Clauses

The general belief at this time is that such a clause is compatible with the law and does not limit or circumscribe the exercise of the general power of appointment over corpus by the spouse "alone and in all events." Moreover, the clause does not make inapplicable the general rule as to the right of a beneficiary's executor or administrator to sums due at the beneficiary's death. Griswold, *Spendthrift Trusts* (Second Edition) page 419. However, many attorneys in this State having in mind *Cowdery* v. *The Northern Trust Company*, 321 Ill. App.

243, 53 N.E.(2d) 43 (1944), may have some hesitation about the use of a spendthrift clause as applied to marital trusts. In that case, the Appellate Court held that a spendthrift clause operated to preclude the payment of income in the hands of the trustee at the death of the beneficiary to her estate, since to do so would make it available for creditors. It would seem advisable for the draftsman to scrutinize the form of spendthrift clause customarily used by him with the new law in mind. Until the effect of a spendthrift provision on the right to an estate tax marital deduction is resolved by official ruling or regulation, the draftsman may feel that this is one of the clauses which may be omitted without serious effect on the general purpose of the trust.

The same considerations and conclusions apply in regard to the so-called undistributed income clause, the effect of which is to direct that upon the death of the beneficiary any undistributed and accrued income shall be paid over as income, to the next taker of income or corpus. Such a clause has the effect of sending all undistributed and accrued income along with corpus to the appointee if the spouse exercises her power of appointment, or to the takers in default if she fails to exercise the power. Section 4 of the Illinois Principal and Income Act specifically deals with the situation and many attorneys may feel that this clause could be omitted without serious effect until its use is sanctioned by official ruling or regulation, rather than to risk any possible forfeiture of an estate tax marital deduction.

A common provision in wills is one authorizing the trustee to hold several trusts of shares created under the instrument as a common fund dividing the income among the several trusts or shares proportionately. Where the balance of the estate is held in trust for the benefit of the surviving spouse, may it not be argued that such a clause is susceptible of a construction that, instead of separate trusts, it operates in effect to establish only one? If it were to have such effect, it would defeat the right to an estate tax marital deduction for the reason that the surviving spouse would not have a power of appointment over the entire corpus. Accordingly, it would appear that the use of such a provision is hazardous. On the other hand, it would not seem objectionable to include a provision authorizing the trustee to assign undivided interests in any assets of the estate to the several trusts and to make joint investments of funds.

Powers

Many attorneys use broad investment clauses and trustees prefer it that way. However, under a broad investment clause it is possible for a trustee to invest trust funds in assets con-

stituting terminable interests as defined by the new law. Does such an investment power in the trustee defeat the right to an estate tax deduction? The only provision in the law that appears to bear on the question is that of paragraph B(iii). It declares that no deduction shall be allowed with respect to a terminable interest if such interest is to be acquired for the surviving spouse "pursuant to directions of the decedent by his executor or by the trustee of a trust." A power in the trustee is not a "direction" from the decedent, and the feeling is that a power to invest moneys in terminable interests should not disqualify a marital trust for a tax deduction, unless it is evident that such an investment power is merely a subterfuge.

Most forms of trustee's powers include provisions authorizing the trustee to amortize bond premiums and discounts, and in general to determine what is income and what is principal and how all receipts and disbursements shall be credited, charged, or apportioned as between income and principal. Does this authority in the trustee jeopardize the marital deduction? The belief is that this power is probably unobjectionable and should not disqualify the trust for an estate tax marital deduction. However, attention is called to the line of cases of which *Dumaine* v. *Dumaine*, 301 Mass. 214, 16 N.E.(2d) 625 (1938), is a leading decision holding that a power in the trustee to determine what is income and what is principal does not confine the trustee to questions of doubt under local law, but permits the trustee to make determinations contrary to local law. In a jurisdiction following this line of authority, such a clause would permit the trustee to declare that which would ordinarily be income to be principal and circumvent the statutory direction that all income from the marital fund must be paid annually to the spouse. No Illinois decision on the question has been found, but it is believed that such a power in the trustee, unless carefully drafted, might jeopardize the marital deduction. Since the Illinois Principal and Income Act covers the majority of problems raised in regard to matters of income and principal, it would seem that until an official ruling or regulation is obtained covering the point, the more prudent course would be to omit such provisions from the trustee's powers.

The final point in regard to drafting wills containing trust provisions is the matter of the inclusion of a renunciation clause directing that in the event of renunciation, the will should be construed as if the spouse had predeceased the testator. Whatever hesitation there may have been heretofore about including such a clause in a will, it would

now seem almost a "must." Particularly is this true where the interests passing to the spouse do not approximate the marital deduction, for by renouncing the will and taking statutory benefits, a marital deduction may be claimed to the extent of such benefits. This is an added inducement to renunciation; and since the Illinois law is such that remainder interests contingent upon the death of the life beneficiary will not be accelerated by renunciation, it becomes doubly important to provide that in case of renunciation, the will shall be read as if the spouse had predeceased the testator.

Spouse's Will

All such wills should, of course, be reviewed in the light of the new law and where the will gives the entire estate to the other spouse, the remarks already made as to the use of the common disaster clause apply. In many cases the inclusion of a six-month clause will be warranted in order to avoid the imposition of additional taxes, should both spouses die within the period. The tax clause should also be carefully scrutinized particularly with reference to waiver of rights of reimbursement.

Lastly, the will should deal with any power of appointment which such spouse may have under any marital trust fund established by the other spouse. If it is desired to exercise such power, the exercise should refer specifically to the power. On the other hand, if it is not desired to exercise the power, a provision should be included expressly negativing such exercise, since the Illinois law is such that under some circumstances a residuary clause may constitute an exercise of a power of appointment even though no reference to the power is made. Such a negativing of an exercise of the power may be accomplished by including in the residuary clause, the words: "But expressly excluding any property over which I may now or hereafter have power of appointment."

The Imperfect Wife

The following advertisement was printed in the September 18th issue of the Wilshire Press: "SENSIBLE, intelligent girl between the age of 25-30 to be my wife. She must be attractive (So I will not have eyes for no one else), a neat dresser, a good cook, be an orphan, I have no in-laws to offer, so naturally I desire no in-laws, must neither smoke or drink, be near-sighted (so she will have eyes for no one else), and must be both deaf and dumb."

Contributor: Mina Sissons,
Los Angeles, California.

The Golden Rule
(Annotated)

by

PHILIP L. GRAHAM

DO UNTO OTHERS AS YOU WOULD HAVE OTHERS DO UNTO YOU.

Definitions

A. The word "others" when used in this rule, shall be taken to mean all those persons or classes of persons other than the doer of a specific act or acts.*

B. "You" in this rule shall be taken to mean any person or persons not falling into the category of "others" as defined in paragraph A. of this article.

C. No portion of this rule shall apply in cases where "others" fall into any of the following categories.

1. During the hours between 8 and 9 a.m. and 4 and 5 p.m., persons residing in a city of the first class while traveling in a subway, bus, surface car, or other public conveyance whether such conveyance be owned by a municipality, an individual, partnership or corporation.

2. Person or persons while operating a motor vehicle.

3. Any person or persons while standing in a line composed of four or more other persons for the purpose of purchasing tickets for a motion picture show, dramatic entertainment, vaudeville or variety show whether in conjunction with a motion picture or not, circus, rodeo, sporting event, or other public amusement of any kind.

4. Any person who by reason of his employment as a motion picture actor, singer, or the leader or conductor of an orchestra or band, has forfeited his rights to privacy.

D. Nothing in this act shall be taken to mean that any mem-

*A corporation is not a person within the meaning of this rule. Smith vs. U. S. Steel, 144 A.D. 221.

ber of the legislature of this state or the Congress of the United States shall be limited in his right to utter slander against any person or persons so long as said slanders are uttered during a regular or special session of such legislature or of Congress duly and properly convened according to the rules governing that body.

Cases

"This rule is in derogation of human nature and shall be strictly construed." Mann v. De Cency, 18 Bunk 143.

"The phrase 'as you would have others do unto you' predicates the ability of others to retaliate or reciprocate in kind for any act or acts done or performed by 'you.' It would be illusory to say that one must do unto others what you would have them do unto you where the others were incapable of so doing. In this case plaintiff was as a matter of law unable to do unto defendant as he alleges defendant ought to have done to him. There must be a literal ability to do or perform to make this rule operative. Therefore, plaintiff not being in a position to do good to the defendant, defendant is not obligated to do any good to plaintiff." Croessus v. Poore, 119 Right 111.

Newspaper reporters, public servants and candidates for public office do not come within the definition of "you" in this rule. People v. Noyes, 110 RSVP 3d 412.

Commas

A comma is a punctuation mark denoting the shortest pause in reading, and separating a sentence into divisions according to construction. The modern tendency is to limit the use of commas and this is especially true of newspaper writers. However, the use of commas is at times extremely important as illustrated by the following two examples by Ripley.

A clerk in Congress instead of writing "All foreign fruit plants free from duty," wrote "All foreign fruit, plants free from duty." This error cost the government over $2,000,000 in duties as it was impossible to correct it until the next session of Congress.

Maria Feodorewna accidentally caught sight of the following note appended to a death warrant. It was in the handwriting of her husband, Alexander III, Tzar of Russia. It read as follows: "Pardon impossible, to be sent to Siberia."

Maria transposed the comma so that it read: "Pardon, impossible to be sent to Siberia." Thereupon the convict was released a free man, saved by a comma.—Your Estate.

Contributor's Corner

Repentance under Duress

There is no moral efficacy in a policy that permits an adventurer to proceed with his unlawful undertaking until he discovers the utter futility of his efforts and when hopeless of all gain, repents and with the aid of the courts is re-established *statu quo ante contractum.* No court in any jurisdiction follows such a policy. There is naturally a type of *locus poenitentiæ* when the police arrive on the scene.—Vice Chancellor Wilfred H. Jayne in *Auditorium Kennel Club* vs. *Atlantic City,* 16 N.J. Mis. R. 360.

Contributor: Miss Dorothy Z. Backes
Trenton, New Jersey

A Judge's Labor Lost

A carpenter sued an administrator of an estate for the amount of $5.00 being the balance on a bill for building a concrete curb around a cemetery lot.

Neither plaintiff nor defendant were represented by counsel. The case lasted about two hours and I was unable to keep one from interrupting the other. We were in a state of confusion through it all. I gave judgment for the defendant because the plaintiff had not carried the burden of proof.

After my decision the defendant said, "Now I want to pay the plaintiff the bill for I do not want to have him think I do not pay my debts." She did so and everybody was happy, except me.

Contributor: Justice James A. Donoho
Hartsville, Tennessee

Tactful Political Candidates

"Even political candidates ought not to be allowed irresponsibility to set up sound equipment in all sorts of public places, and few of them would regard it as tactful campaigning to thrust themselves upon picnicking families who do not want to hear their message."

—*Jackson, J., in Saia v. New York,*
92 L ed Adv. Ops. 1087, at page 1095.

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